

# EXHIBIT A

**BOIES SCHILLER FLEXNER LLP**

David Boies (admitted pro hac vice)  
333 Main Street  
Armonk, NY 10504  
Tel: (914) 749-8200  
dboies@bsflfp.com

Mark C. Mao, CA Bar No. 236165  
Beko Reblitz-Richardson, CA Bar No. 238027  
Erika Nyborg-Burch, CA Bar No. 342125  
44 Montgomery St., 41st Floor  
San Francisco, CA 94104  
Tel.: (415) 293-6800  
mmao@bsflfp.com  
brichardson@bsflfp.com  
enyborg-burch@bsflfp.com

James Lee (admitted pro hac vice)  
Rossana Baeza (admitted pro hac vice)  
100 SE 2nd St., 28th Floor  
Miami, FL 33131  
Tel.: (305) 539-8400  
jlee@bsflfp.com  
rbaeza@bsflfp.com

Alison L. Anderson, CA Bar No. 275334  
725 S Figueroa St., 31st Floor  
Los Angeles, CA 90017  
Tel.: (213) 995-5720  
alanderson@bsflfp.com

**SUSMAN GODFREY L.L.P.**

Bill Carmody (admitted pro hac vice)  
Shawn J. Rabin (admitted pro hac vice)  
Steven M. Shepard (admitted pro hac vice)  
Alexander Frawley (admitted pro hac vice)  
1301 Avenue of the Americas, 32nd Floor  
New York, NY 10019  
Tel.: (212) 336-8330  
bcarmody@susmangodfrey.com  
srabin@susmangodfrey.com  
sshepard@susmangodfrey.com  
afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891  
1900 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067  
Tel.: (310) 789-3100  
abonn@susmangodfrey.com

**MORGAN & MORGAN**

John A. Yanchunis (admitted pro hac vice)  
Ryan J. McGee (admitted pro hac vice)  
201 N. Franklin Street, 7th Floor  
Tampa, FL 33602  
Tel.: (813) 223-5505  
jyanchunis@forthepeople.com  
rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805  
711 Van Ness Ave, Suite 500  
San Francisco, CA 94102  
Tel: (415) 358-6913  
mram@forthepeople.com

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO  
individually and on behalf of all other similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' [PROPOSED] SUR-REPLY  
IN OPPOSITION TO GOOGLE'S  
MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Yvonne Gonzalez Rogers  
Hearing Date: May 12, 2023  
Time: 1:00 p.m.  
Location: Courtroom 1 – 4th Floor

1 Sensing defeat, Google’s summary judgment reply brief desperately adds a new argument  
 2 related to Plaintiffs’ CDAFA claim. Google claims that the “CDAFA requires that the defendant  
 3 circumvent[] technical or code-based barriers, or otherwise render ineffective any barriers . . . to  
 4 prevent access,” and Google argues that Plaintiffs cannot meet this standard. Dkt. 934 at 13.

5 Courts have rejected this interpretation of the CDAFA. In 2015, the Ninth Circuit clarified  
 6 that, unlike the Computer Fraud and Abuse Act, the CDAFA “does not require unauthorized  
 7 access. It merely requires knowing access.” *United States v. Christensen*, 828 F.3d 763, 789 (9th  
 8 Cir. 2015). The “term ‘access’ as defined in the [CDAFA] includes logging into a database with  
 9 a valid password and subsequently taking, copying, or using the information in the database  
 10 improperly.” *Id.* In light of *Christensen*, numerous courts have rejected Google’s contention that  
 11 technical circumvention is required. *See, e.g., Henry Schein, Inc. v. Cook*, 2017 WL 783617, at  
 12 \*5 (N.D. Cal. Mar. 1, 2017) (explaining how the Ninth Circuit in *Christensen* resolved “a split  
 13 of authority” over whether technical circumvention is required, and held it was not); *Rodriguez*  
 14 *v. Google*, 2021 WL 2026726, at \*7 (N.D. Cal. May 21, 2021) (similar).

15 *Rodriguez* is instructive. Google likewise argued that “a party only acts ‘without  
 16 permission’ when it ‘circumvents technical or code-based barriers in place to restrict or bar a  
 17 user’s access.’” *Id.* at \*7. The court disagreed: “the Ninth Circuit repeatedly has emphasized that  
 18 ‘[a] plain reading of the statute demonstrates that its **focus is on the unauthorized taking or use**  
 19 **of information.**” *Id.* (emphasis added) (quoting *Christensen*, 828 F.3d at 789). Plaintiffs need  
 20 only demonstrate “Google’s knowing access to, and unpermitted taking of, plaintiffs’ [] data.”  
 21 *Id.* Here, whether Google had permission to access Plaintiffs’ private browsing data is a triable  
 22 issue of fact because a jury could find that Google did not obtain their consent to collect this data.  
 23 *See also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1101 (N.D. Cal. 2015) (even before  
 24 *Christensen*, casting doubt on the technical-circumvention standard, reasoning that to “hold[] that  
 25 a defendant acts with ‘permission’ for purposes of the CCDFFA any time it does not need to  
 26 overcome ‘technical or code based barriers in place to restrict or bar a user’s access’ leads to

1 results which strain the plain and ordinary meaning of the term ‘permission’’).

2 But even if the Court were to overlook *Christensen*, there would still be a triable issue of  
 3 fact because Plaintiffs have uncovered evidence demonstrating there is no way to prevent  
 4 Google’s collection of private browsing data. Dkt. 933-3 (SUF 79). This evidence includes  
 5 Plaintiffs’ expert’s analysis as well as admissions from Google employees and experts. For  
 6 example, when asked how to prevent “Google from logging their Incognito activity” on  
 7 “Google’s servers,” ***former employee Rory McClelland admitted “there is no way that users***  
 8 ***can prevent that.”*** Mao Ex. 20 at 318:3-12 (emphasis added). Such evidence raises a triable issue  
 9 of fact even under Google’s (legally incorrect) standard because Plaintiffs “had no way to remove  
 10 the [Google tracking beacons] or to opt-out of [their] functionality.” *In re Carrier IQ, Inc.*, 78 F.  
 11 Supp. 3d at 1101. “That is sufficient” under Google’s proposed test. *Id.*

12 Dated: April 28, 2023

BOIES SCHILLER FLEXNER LLP

By /s/ Mark Mao

Mark C. Mao (CA Bar No. 236165)  
 mmao@bsflp.com

Beko Reblitz-Richardson (CA Bar No. 238027)  
 brichardson@bsflp.com

Erika Nyborg-Burch (CA Bar No. 342125)  
 enyborg-burch@bsflp.com

BOIES SCHILLER FLEXNER LLP

44 Montgomery Street, 41<sup>st</sup> Floor

San Francisco, CA 94104

Telephone: (415) 293 6858

Facsimile (415) 999 9695

David Boies (admitted pro hac vice)

dboies@bsflp.com

BOIES SCHILLER FLEXNER LLP

333 Main Street

Armonk, NY 10504

Telephone: (914) 749-8200

Facsimile: (914) 749-8300

James W. Lee (*pro hac vice*)

jlee@bsflp.com

Rossana Baeza (*pro hac vice*)  
rbaeza@bsflp.com  
BOIES SCHILLER FLEXNER LLP  
100 SE 2<sup>nd</sup> Street, Suite 2800  
Miami, FL 33130  
Telephone: (305) 539-8400  
Facsimile: (305) 539-1304

Amanda Bonn (CA Bar No. 270891)  
SUSMAN GODFREY L.L.P.  
1900 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067  
Telephone: (310) 789-3100

Bill Carmody (*pro hac vice*)  
bcarmody@susmangodfrey.com  
Shawn J. Rabin (*pro hac vice*)  
srabin@susmangodfrey.com  
Steven Shepard (*pro hac vice*)  
sshepard@susmangodfrey.com  
Alexander P. Frawley (*pro hac vice*)  
afrawley@susmangodfrey.com  
SUSMAN GODFREY L.L.P.  
1301 Avenue of the Americas, 32<sup>nd</sup> Floor  
New York, NY 10019  
Telephone: (212) 336-8330

John A. Yanchunis (*pro hac vice*)  
jyanchunis@forthepeople.com  
Ryan J. McGee (*pro hac vice*)  
rmcgee@forthepeople.com  
MORGAN & MORGAN, P.A.  
201 N Franklin Street, 7th Floor  
Tampa, FL 33602  
Telephone: (813) 223-5505  
Facsimile: (813) 222-4736

Michael F. Ram, CA Bar No. 104805  
MORGAN & MORGAN  
711 Van Ness Ave, Suite 500  
San Francisco, CA 94102  
Tel: (415) 358-6913  
mram@forthepeople.com

*Attorneys for Plaintiffs*